

Straw Proposals: State Decision Making on Siting of Grid-Scale Wind Power Projects

This document outlines, for discussion purposes, three straw proposals for revision of Maine's current approach to decision making on proposals for development of grid scale wind power projects. Part One briefly references potential revisions to substantive standards that are common to all the straw proposals. Part Two outlines the proposals themselves, with a focus on the decision making process.

Inclusion of a straw proposal in this document neither indicates nor implies its support or endorsement by Task Force members.

Part One: Revisions to Substantive Approval Standards Common to All Proposals

Natural resources issues. Pertinent site review and permitting authorities would be amended or adopted to ensure that:

- *Clear approval requirements* that address impacts specifically associated with wind power projects (e.g., those re: noise, bird and bat populations, and scenic resources), set clear standards for approval, clarify information requirements associated with standards of approval (e.g., study protocols), and are based on best currently available information
- *Decommissioning* is required as a condition of approval
- Suitable provision is made for *mitigation* of a project's adverse effects. Three potential approaches to such compensatory mitigation include: voluntary measures, proposed by the applicant as part of its overall proposal; contribution to a state mitigation fund based on the project size or value; and/or compensation specific to effects on certain natural resources, e.g., high mountain areas. Mitigation requirements under current law (e.g., wetlands) would be maintained.
- *Consideration is given to a wind power project's environmental benefits*, including those regarding its contribution achievement of renewable energy generation and greenhouse gas-related goals (e.g., RGGI goals) and its advantages regarding emission of CO₂ and other air pollutants as compared with generation from fossil fuel sources in making the State's siting decision. Note: Each of the straw proposals takes a different approach to assurance of such consideration.

Land use compatibility issues (unorganized area). LURC would amend its Comprehensive Land Use Plan (CLUP) and rezoning standards and designate areas, currently zoned as protected mountain areas (P-MA) or general management districts (M-GN), within which wind power would be an allowable use. LURC would consider pertinent information regarding natural resources characteristics and related public uses

in revising its zoning. By statute, LURC would be directed to revise its zoning and rezoning standards by a date certain.

Each of the straw proposals outlines a somewhat different interim approach to LURC's consideration of land use issues during the transitional period before completion of the requisite revisions to its zoning.

The straw proposals do not address local land use decision making regarding projects in the State's organized area.

Note: Under each straw proposal, application fees would be designed to cover all state agency review costs, including those regarding conduct of an adjudicatory hearing, if required.

Part Two: Straw Proposals

Straw Proposal 1: True-up of Existing Regulatory Framework

Decision-makers:

Projects in organized areas (i.e., within municipal boundaries). DEP/BEP would be the lead agency; DMR, DIFW, and DOC would serve as main review agencies as under current law. No change would be made regarding BEP authority. By default, DEP Commissioner would make decisions under applicable authorities (e.g., site law, NRPA), while BEP may assume jurisdiction on its initiative, at DEP's suggestion, or at request of an interested party.

Projects wholly in unorganized areas. LURC (with new authority provided to its executive director) would be the lead agency. DMR, DIFW, DEP, and DOC serve as main review agencies as under current law. LURC's authorizing legislation would be amended to allow LURC's executive director to issue requisite approvals while allowing the Commission to assume jurisdiction in the manner which the BEP may.

Projects in both organized and unorganized areas. Current law would be amended to give DEP sole permitting authority over all projects: 1) located in zones where wind power is an allowable use; and 2) located in zones where wind power is not an allowable use, if the Commission approves rezoning.

Staff

State agency staff at DEP, LURC and natural resources agencies would perform their permit review-related roles as under current law.

PUC staff would have new responsibilities regarding review of project's renewable energy, greenhouse gas and air quality-related implications as described

below, in consultation with DEP and the Office of Energy Independence and Security (OEIS).

Process for Harmonizing Administrative Procedures

DEP and LURC would be directed, in accordance with a legislatively established schedule, to revise their administrative procedures to ensure that wind power proposals are processed as uniformly and expeditiously as possible statewide, and to that end to make administrative changes that may be accomplished under existing law (rule or statute) by a date certain. The agencies would consult with interested parties in making such changes. The law would also require the agencies to initiate rulemaking (minor technical rules) and identify any statutory changes necessary to that end by a date certain. The agencies would jointly report to the Legislature on activities pursuant to these mandates and include in that report recommended statutory changes. Potential changes include but are not limited to creation of a common application forms and application fee schedule; common protocols regarding information needed to review key issues (e.g., noise, effects on birds and bats, and scenic effects); common and clear approach and schedule for determining if an application is complete for review; the schedule for application processing; use of consultants to facilitate review; decision on when to hold a public hearing; and provision for circulation of draft orders.

Approval standards

Applicable laws; approach to consideration of project benefits. . Current siting related authorities (e.g., site law, NRPA and LURC statute and chapter 10 land use districts and standards), amended as follows , would continue to govern review and approval of project proposals. Pertinent laws and rules currently administered by DEP and LURC would be amended to clarify that in applying "unreasonable" adverse effect and related decision criteria consideration must be given to a wind power project's environmental benefits, including those regarding its contribution to achievement of renewable energy generation and greenhouse gas-related goals (e.g., RGGI goals) and its advantages regarding emission of CO₂ and other air pollutants as compared with generation from fossil fuel sources. DEP would consult as necessary with PUC and OEIS to analyze and make findings regarding such project benefits for projects statewide. LURC would consider DEP's findings in making decisions on projects in the unorganized area.

Land use compatibility (unorganized area). See Part One; see also, Transitional provision, below.

Process overview

Pre-filing stage. Pursuant to published guidance and procedural requirements (revised if and as needed and modeled after DEP's chapter 2 rules for major site law projects), prospective applicants for projects in both DEP and LURC jurisdiction would be advised to hold informational meetings in the host community to identify issues and

concerns as early as possible in the project planning process. In addition, prospective applicants would be required to hold a pre-filing meeting with the lead agency (DEP or LURC) to identify applicable approval criteria and related information submission requirements and a public meeting in the project area no more than 30 days before filing an application.

Application review stage. Both DEP and LURC would review applications with comments from natural resources agencies as well as PUC and OEIS and provide for public comment as under current law, subject to revisions discussed above (see "Process for Harmonizing Administrative Procedures" section).

Appeal stage. There would be no change. A DEP decision could be appealed to the Board. A LURC (including new decision by the executive director), DEP or BEP decision could be appealed to Superior Court for review on the record pursuant to the standard for review in the Maine Administrative Procedure Act.

Compliance enforcement phase. There would be no change. DEP and LURC, through the Attorney General's office as appropriate, would have authority to enforce their decisions. DEP and LURC would provide lead staff for purposes of enforcement of their respective decisions.

Transitional Provision; LURC Rezoning

As an interim measure, pending rulemaking to revise its zoning districts and rezoning standards, LURC (executive director or Commission, as applicable) would be required to determine within a specified time period, in lieu of rezoning and pursuant to a new statutory authority whether a proposed wind power development is a compatible land use based on consideration of current zoning and pertinent information regarding site and area specific natural resources characteristics and related public uses.

Straw Proposal 2: Wind Energy Siting Review Board

Decision makers

An interagency board ("Board") comprised of the following would have siting authority over grid-scale wind power projects statewide: Commissioners of DEP, DOC, DMR (for projects located in Maine's coastal zone), chair of PUC, chair of LURC, chair of BEP, and a representative of a statewide conservation organization and a representative of a electric power generation company, appointed by Governor and subject to legislative confirmation.

Staff

The Board would be organized within the PUC, which would provide administrative support.

DEP would be the lead agency on environmental issues for projects statewide. The main review agencies would be: LURC (for projects in the unorganized area), DMR (for projects in coastal zone), DIFW, the Office of Energy Independence and Security, and DOC, which would provide comments on natural resources related issues in a manner comparable to the current permitting system.

DIFW would also provide review and assessment under the Maine Endangered Species Act (MESA), where applicable, which would apply as under current law.

PUC, in consultation with OEIS, would be the lead agency regarding energy issues statewide. PUC would staff adjudicatory hearings when applicable (see below.)

For projects located in the unorganized territory, LURC would be the lead agency on the issue of land use compatibility.

Approval standards

Applicable law; approach to consideration of project benefits A new wind energy specific law, applicable to projects statewide, would provide for agency certifications and decision by the Board in lieu of current permitting decisions, as follows.

Environmental certification. DEP would review projects statewide for consistency with current DEP-administered laws governing siting decisions, amended as described in Part One, and in consultation with PUC, OEIS, and natural resources agencies, provide a certification on whether the proposal is consistent with applicable laws.

DIFW would provide a certification pursuant to the MESA, as applicable.

Land use compatibility certification (unorganized area). LURC's executive director would be required to certify whether a proposed wind power development is an allowable use in the zone(s) proposed under the revised zoning as described in Part One. Alternatively, if the project is not an allowed use in the zone(s) proposed, the applicant would be entitled to request rezoning, as under current law, in which case the executive director's certification would be based the Commission's decision on the rezoning proposal. See also, Transition provision, below.

Renewable energy certification. PUC, in consultation with OEIS, would be required to certify whether a project provides public benefits to Maine residents based on consideration of the need for energy generated by the project, its compatibility with the transmission system, its relationship to state and regional renewable energy policy objectives, and its potential effects on electric rates, employment, and other pertinent socio-economic matters.

Board review of certifications and decision. The Board would have the authority to review the above agency certifications, hold an adjudicatory hearing to consider additional information under circumstances described below, and approve, approve with conditions, or deny applications for a consolidated state siting approval.

Process Overview

Pre-filing stage. Pursuant to published guidance and Board procedures (modeled after DEP's chapter 2 rules for major site law projects), prospective applicants would be advised to hold informational meetings in the host community to identify issues and concerns as early as possible in the project planning process. In addition, prospective applicants would be required to hold a pre-filing meeting with the Board's staff to identify applicable approval criteria and related information submission requirements and a public meeting in the project area no more than 30 days before filing an application.

Application review and certification stage. For all projects statewide, applicants for grid-scale projects would apply to the Board for a consolidated state siting approval.

On receipt, the Board would send the application to DEP, PUC and LURC (as applicable) for purposes of review and certification. Each lead agency would have 15 days to determine if the application is complete for purposes of review. If the submission is found incomplete, the agency must so notify the Board and applicant and specify information needed to complete the application for review purposes. Additional information may be required subsequently but does not affect the time allotted for certification. (As under current DEP process, e.g., acceptance of an application for purposes of beginning the review does not mean all the information that's needed has been submitted.) Certification may be denied for lack of information.

DEP's environmental review would be comparable to that conducted for review of a regular permit application. DEP staff would develop a draft certification and the DEP commissioner (as opposed to BEP) would make the certification decision.

If a project is an allowed use in the zone(s) proposed, LURC executive director would so certify without further inquiry. If not, the Commission's approval of rezoning, as under current law, would be required as noted above within a time certain.

PUC's review would focus on the proposal's consistency with state energy policy, as applicable, the need for energy generated by the project, its compatibility with the transmission system, and relationship to state and regional renewable energy policy objectives. PUC staff would develop a draft certification and the PUC would make the certification decision.

Within a time certain of its determination that the submission is complete for review purposes, each lead agency, following consultation with review agencies and providing opportunity for public comment, would certify whether or not the proposal

meets pertinent approval criteria and transmit its certification decision to the Board and applicant and interested parties that have requested it.

The lead agency may hold a public meeting (as opposed to an adjudicatory hearing) regarding its certification if, in its discretion, it determines such a meeting would provide information useful for its review. Each lead agency would provide the applicant, review agencies and interested parties that have so requested an opportunity to comment on the draft certification before it is issued. Based on its findings, each lead agency would, alternatively, certify the project's consistency (with or without conditions) or deny certification. In an agency failed to issue its certification within the prescribed time, its certification approval would be deemed issued by waiver, absent agreement with applicant or the Board's approval to extend the review period.

Board review stage. Within a time certain of receipt of the agencies' certifications, the Board would hold a public meeting to review the certifications and determine whether to grant or deny siting authority. Alternatively, the Board could decide to schedule an adjudicatory if it determines consideration of additional information is in the public interest to ensure full and fair consideration of issues germane to the certifications. The Board would be authorized to schedule a hearing if a majority disagreed with one or more certification decision (i.e., one or more grounds for approval or denial, or condition of approval) or in response to an interested party's request for a hearing on determination that consideration of additional information on one or more of such issues is necessary and appropriate.

Board hearings would be conducted under PUC's adjudicatory hearing rules and PUC would provide staff support. The Board would issue its final decision in 180 days from the date the application was accepted as complete for review.

Appeal phase. The Board's decision to issue or deny approval (following completion of the adjudicatory hearing if held) would be final agency action appealable to the law court (state supreme court) for review on the record pursuant to the standard for review in the Maine Administrative Procedure Act.

Compliance enforcement phase. The Board, in consultation with the Attorney General's office as appropriate, would have authority to enforce its decisions. DEP would provide lead staff for purposes of enforcement actions for projects in organized areas, and LURC would do so for projects in unorganized areas.

Transitional provision; LURC rezoning.

As an interim measure, pending rulemaking to revise LURC's zoning districts and rezoning standards, LURC's executive director would be authorized to grant certification, in lieu of rezoning, if she finds that a proposed wind power development is a compatible land use based on consideration of current zoning and pertinent information regarding site and area specific natural resources characteristics and related public uses.

Straw Proposal 3: New Wind Power Siting Authority

Decision makers

A new ad hoc Wind Power Siting Authority ("Authority") would have jurisdiction over and meet as needed to consider grid-scale wind power project proposals statewide. The Authority would be made up of the following: Chair of PUC and two public members, appointed by the Governor, subject to legislative confirmation, one with expertise in land use matters and one with expertise in wildlife and related natural resources matters. The BEP and LURC chairs would serve as (non-voting) ex officio members. The public members would be compensated at a professional rate commensurate with their services.

Staff

The Authority would be organized within PUC, which would provide administrative support.

State agency staff at DEP and PUC would review project proposals and develop recommendations on a project's compatibility with environmental standards and renewable energy related public benefits for the Authority's consideration, as described below. DEP's review responsibilities would be comparable to those under existing law but pursuant to a new wind power-specific statute.

Under the same new law, PUC staff would have new responsibilities regarding review of wind power projects' renewable energy related implications as described below. PUC would staff adjudicatory hearings when applicable (see below.)

DMR, DIFW and DOC would perform permit review-related roles comparable to those under current law and develop recommendations on whether a project provides public benefits regarding conservation of state natural resources, as described below. DIFW would review the project pursuant to the Maine Endangered Species Act (MESA), as applicable, which would continue to apply to proposed projects as under current law.

LURC staff would continue to have responsibilities regarding administration of LURC zoning, as described below.

Approval standards

Applicable law; approach to consideration of project benefits Pursuant to a new, wind power-specific statute, the Authority would determine whether to allow siting and development of a proposed grid scale wind power project based on a public interest-based test. Approval by the Authority would be required in lieu of all DEP and/or LURC permit approvals currently required for grid scale wind energy projects. (See provision re: LURC zoning approval below.) The Authority's decision on whether the project, considered as a whole, is in the public interest would be based on consideration of its:

- Consistency with applicable environmental standards, which would be derived from existing criteria of approval under the Site Location of Development Act, NRPA and other pertinent authorities administered by DEP; and
- Natural resources and conservation related benefits and benefits to Maine's electric power consumers, businesses and workers, including but not limited to those regarding its contribution to achievement of renewable energy generation and greenhouse gas-related goals (e.g., RGGI goals), advantages regarding emission of CO2 and other air pollutants as compared with generation from fossil fuel sources.

The Authority, with recommendations from state agencies as noted above, would make the requisite findings of fact and conclusions of law on whether a project meets the public interest test. As described below, the Authority may hold an adjudicatory hearing to consider additional information as it deems necessary and appropriate to make factual findings and legal conclusions to approve, approve with conditions, or deny state siting approval.

Land Use Issues: LURC zoning approval (unorganized area)

For projects in the unorganized area, current law would be amended to authorize LURC's executive director to determine whether the proposed project is an allowed use in the pertinent zone(s). If a proposed project is not an allowed use in the zone(s) in which it is proposed, LURC's approval of a rezoning under the current planned development district standards would be required in addition to state siting approval by the Authority.

Process overview

Pre-filing stage. Pursuant to published guidance and procedural requirements modeled after DEP's chapter 2 rules for major site law projects, prospective applicants would be advised to hold informational meetings in the host community to identify issues and concerns as early as possible in the project planning process. In addition, prospective applicants would be required to hold a pre-filing meeting with the Authority's staff (with PUC as the lead agency) to identify applicable approval criteria and related information submission requirements and a public meeting in the project area no more than 30 days before filing an application.

Application review stage. Application for siting approval would be made to the Authority and processed by PUC staff, which would distribute the application to DEP, review agencies, and LURC (on land use compatibility/zoning, when applicable; see above). Within 15 days of receipt, PUC, in consultation with other state agencies, would determine whether the application is complete for review. Additional information may be deemed necessary as the agencies' review proceeds. Within a time certain, the state agencies noted above would provide recommended findings of fact and conclusions of law regarding the project's consistency with environmental standards and provision of

public benefits. Subsequently, within a time certain, the Authority would issue and provide notice and opportunity for comment (public and applicant) on draft findings of fact and conclusions of law or schedule an adjudicatory hearing on the proposal. The statute would provide for decision by the Authority within 180 days from the date of the application's acceptance.

Adjudicatory hearing phase. At its discretion, the Board would hold an adjudicatory hearing, using PUC's adjudicatory hearing rules (amended as appropriate), if it determined such a hearing necessary and appropriate to provide additional information for its consideration or otherwise in the public interest. During the public comment period, interested parties would have an opportunity to request intervenor status and/or an adjudicatory hearing on the grounds noted above.

On notice to the Authority, DEP, LURC, DMR, DIFW, DOC, the Office of the Public Advocate and the Department of Attorney General would be entitled to intervenor status in adjudicatory hearings.

Appeal stage. The Authority's decision could be appealed to the Law Court (Maine's supreme court) for review on the record pursuant to the standard for review in the Maine Administrative Procedure Act.

Compliance enforcement phase. The Authority, through the Attorney General's office as appropriate, would have authority to enforce its decisions. DEP or PUC would provide lead staff for purposes of enforcement actions statewide.

Transitional provision; LURC rezoning.

As an interim measure, pending rulemaking to revise LURC's zoning districts and rezoning standards, LURC's executive director would be required to determine, in lieu of rezoning and pursuant to a new statutory authority, whether a proposed wind power development is a compatible land use based on consideration of current zoning and pertinent information regarding site and area specific natural resources characteristics and related public uses.